

SIGNATURE PROOF
GARY PETERSON 8/26/96
Joanie

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

JOHN W. STRECKFUS
Claimant

VS.

FINNEY COUNTY DEPARTMENT OF PUBLIC WORKS

Respondent

EMPLOYERS MUTUAL INSURANCE
Insurance Carrier

AND

KANSAS WORKERS COMPENSATION FUND

Docket No. 169.524

ORDER

Respondent filed an application for review before the Appeals Board requesting review of an Award entered by Administrative Law Judge Jon L. Frobish dated February 26, 1996. The Appeals Board heard argument by telephone conference on July 23, 1996.

APPEARANCES

Respondent and its insurance carrier appeared by their attorney, Allen G. Glendenning of Great Bend, Kansas. The Workers Compensation Fund appeared by its attorney, Kent Roth of Great Bend, Kansas. The claimant did not appear having previously settled his case with respondent on June 17, 1993. There were no other appearances.

RECORD AND STIPULATIONS

The Appeals Board has considered the record and adopted the stipulations listed in the Award.

ISSUES

Respondent raised the following issue for Appeals Board review:

- (1) The liability of the Kansas Workers Compensation Fund (Fund).

The Fund, prior to oral argument, raised the following additional issues:

- (2) Whether the Fund is liable for fees charged by experts employed by the respondent to testify on the issue of Fund liability.
- (3) Whether the Fund should be awarded attorney fees as provided by K.S.A. 1992 Supp. 44-566a(f).

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the evidentiary record, hearing arguments and considering the briefs of the parties, the Appeals Board finds as follows:

(1) The question of Fund liability is the first issue the Appeals Board will address in this Order as it is the dispositive issue. The Administrative Law Judge denied assessing liability against the Fund. He found respondent failed to prove that it knowingly retained an employee with a physical impairment of such a nature as to constitute a handicap in obtaining or retaining employment. Respondent argued that the testimony of Max A. Morgan, director of public works for the respondent and claimant's supervisor on the date of his accident, July 13, 1992, established that the respondent had knowledge that claimant had previous injuries and problems with his low back. The Administrative Law Judge found the facts in this case similar to *Hinton v. S.S. Kresge Co.*, 3 Kan. App. 2d 29, 529 P.2d 471 (1978), rev. denied 225 Kan. 844 (1979), which held that although claimant had sustained a previous back injury such knowledge of an injury was insufficient to show that the claimant was a handicapped employee.

The Appeals Board agrees with the reasoning and analysis of the Administrative Law Judge and thus affirms the Award. Specifically, the Appeals Board finds that respondent failed to establish that it had knowledge that claimant had a preexisting physical impairment which constituted a handicap prior to his work-related July 13, 1992 accident. Claimant testified that he previously injured his back while working for the respondent on June 3, 1992. He received chiropractic treatment for such injury and was off work for approximately five days. However, claimant testified that he returned to his regular job without restrictions. Furthermore, claimant testified he did not consider himself a handicapped or disabled person. The Appeals Board finds the respondent has, therefore, failed to establish the requirements of Fund liability as set forth in K.S.A. 1992 Supp. 44-567. The Appeals Board also finds the findings of fact and conclusions of law as stated in the Award entered by the Administrative Law Judge are reasonable and appropriate. The Appeals Board finds it is not necessary to repeat those findings of fact and conclusions of law in this Order. The Appeals Board, therefore, adopts those findings as its own for purposes of this appeal.

(2) The Appeals Board finds this issue need not be addressed in this Order because of the previous finding that the Fund has no liability for any portion of the Award.

(3) If the Fund was not found liable for any portion of this settlement award, the Fund requested reasonable attorney fees be awarded pursuant to K.S.A. 1992 Supp. 44-566a(f).

The Appeals Board finds that the request for attorney fees was not made before the Administrative Law Judge and, therefore the Appeals Board does not have the jurisdiction to review this issue. The Appeals Board's jurisdiction is limited to review of acts, findings, awards, decisions, rulings, or modifications of findings or awards made by an administrative law judge. See K.S.A. 44-551(b)(1), as amended.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award of Administrative Law Judge Jon L. Frobish dated February 26, 1996, should be, and the same is hereby, affirmed.

IT IS SO ORDERED.

Dated this ____ day of August 1996.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Allen G. Glendenning, Great Bend, KS
 Kent Roth, Great Bend, KS
 Jon L. Frobish, Administrative Law Judge
 Philip S. Harness, Director